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In The

# Supreme Court of the United States

October Term, 1995

In the Matter of the Complaint

of

TONQUIN FISHERIES, INC., a Washington corporation, owner of the FV TONQUIN, Official No. 529425, for Exoneration From or Limitation of Liability,

*Petitioner.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## RESPONSE TO QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in holding that Section 53 of the Federal Employer's Liability Act, 45 U.S.C. § 53, which prohibits a reduction of an employee's damages for comparative negligence where the employer's violation of "any statute enacted for the safety of employees contributed to the death or injury of such employee," barred the employer's reliance on the doctrine of comparative negligence under the Jones Act, where the seaman's death was caused by his employer's violation of Coast Guard safety regulations implementing the Commercial Fishing Vessel Safety Act of 1988?

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## RESPONSE TO STATEMENT OF THE CASE

### A. Statement of Facts.

#### 1. The TONQUIN Was A Wooden-Hull Vessel Built In 1943, And Owned By The Parker Family For Many Years Before It Sank In October, 1991.

The TONQUIN was a wooden-hull vessel built in 1943 by the U.S. Navy. (RT 33)[1] She measured 105 feet in length, and had a capacity of 199.6 gross tons. (RT 33, 35) (Exhibit A-133)

The TONQUIN was owned by petitioner Tonquin Fisheries, Inc. (RT 21) Burton Parker, president of Tonquin Fisheries, first worked on the TONQUIN when he was in high school in about 1967. (RT 22) The TONQUIN had been converted to a stern trawler in 1962, and that was its configuration when it sank. (RT 312) After Mr. Parker's father sold the TONQUIN, she sat unattended in Kodiak Harbor for about six years. (RT 308-09) During this time, the boat was used by local drunks as a flophouse, was subjected to considerable abuse and vandalism, and even partially sank. (Burke, p. 13, RT 309) Burt Parker repurchased the boat in the 1980's and worked with his brother Steve Parker to repair it. (RT 310, 312, 314) The Parkers began fishing with the boat once again in 1987. (RT 312) Steve Parker served as captain. (RT 32)

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[1] Citations are to the Reporter's Transcript (RT), the Depositions filed in the district court (e.g., Burke p.13), and to the decisions of the district court and Court of Appeals which have been attached as the appendix to either the Petition for Certiorari (e.g., Pet. App. 9), or Respondent's Brief in Opposition (e.g., Resp. App. 2-3).

The Parkers placed the TONQUIN into a corporation in 1989, with Burt as president and Steve as secretary. (RT 29)

### 2. The TONQUIN Was Unseaworthy When It Sank Off The Alaskan Coast.

The TONQUIN sank on October 13, 1991, while fishing off the south coast of Kodiak, Alaska. Respondent's husband, Larry Tousignant, was the captain of the vessel. His body was never recovered. His death was caused by the sinking of the TONQUIN. (F/F 4-7, Pet. App. 9)

#### a. The TONQUIN Lacked A Watertight Lazarette.

The TONQUIN was unseaworthy in many respects. For instance, the TONQUIN lacked a watertight lazarette. The lazarette is the rear compartment at the stern of a vessel. The lazarette serves as a stern collision bulkhead for the ship so that leaks in the stern do not flood the entire vessel. (Windsor, pp. 20-21) Without a watertight lazarette, a vessel would not be seaworthy for service in the Gulf of Alaska in October. (Windsor, pp. 21-22) A crew member testified to his observations while he was a crew member in early 1991:

> The boat was just starting to leak just too bad, something had to be done with it. I was pumping the boat out every two hours. It took me an hour and a half to get the bilge dry again.

(RT 87) Shipyard repairs in Astoria in early 1991 temporarily slowed the leaks, but the leaks resumed. (RT 98)

While in the lazarette, a crew member could look up to the corner where the bulwarks come down to the hull, and see daylight where the wood had rotted away at the stern. The lazarette had deteriorated to the point that you could "take your fingernail and knock out a chunk of wood." (Mielus, p.10)

In May 1991, diesel mechanic Randall Erickson observed the TONQUIN crew securing the boom by tying it off to the stern of the vessel. (Erickson, p. 12) As the crew winched up the boom to take the slack out of the line, the deck pulled away from the hull:

> It separated under the deck. The wood, the way it was built, just split. It had been split. It was an old rot. And it just pulled the boat up, then they let it down again.

(Erickson, p. 12) Corporate officer, Steve Parker, was skipper of the TONQUIN at the time. (Erickson, p. 27) After seeing the deck split away from the stern, Erickson refused to take the TONQUIN out of the harbor for sea trials to test his repairs on the diesel engine. (Erickson, p. 16)

Various crewmen described substantial leaks in the aft fish hold. The stanchions, or upright posts in the stern of the vessel shown on Exhibit A-121, were loose and leaked into the fish hold. (RT 91-92, 119; Rohl, pp. 6-7; Swenson, p. 8) Crewman Rohl, who was aboard the F/V TONQUIN when it sank, testified that the stanchion leaked "gallons every time there was standing water on the deck." (Rohl, p. 22) Water also leaked into the aft fish hatch through the hatch cover itself. (RT 91) Only 4 out of 14 bolts on the hatch cover were in working order.

(Burke, pp. 21-22) The edge of the cover was so badly bent out of shape that it did not maintain contact with the gasket, 25% of which was either inoperable or missing. (Burke, p. 22)

One of the knee braces in the aft fish hatch was so badly cracked that a crew member could see the bolts inside the brace. (Burke, pp. 29-30) A knee brace is a structural support piece which holds the boat together where framing comes together at an angle. The knee braces keep the hull from twisting out of shape. (Windsor, pp. 26-27) A professional engineer testified that the split knee brace, the leaks through the stanchion mountings, and the leaking hatch each rendered the F/V TONQUIN unseaworthy for service in October in the Gulf of Alaska. (Windsor, pp. 28, 33, 34)

The district court found that, "At the time of its sinking, the TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy." (F/F 9, Pet. App. 9) Petitioner did not challenge this finding on appeal. (Pet. App. 3)

**b. The TONQUIN Had No Functioning Bilge Alarm.**

The district court found:

> 10. At the time of the sinking, the F/V TONQUIN did not have an operating bilge alarm or high water alarm anywhere onboard.
>
> 11. As of the end of May, 1991, there was no operating bilge alarm because Steve Parker, Tonquin Fisheries, Inc.'s corporate secretary and then skipper of the F/V TONQUIN, and a crew

> member, Robert Steinman, yanked out the wires of the bilge alarm. They yanked out the wires over frustration at its going off inappropriately and unrelated to the water level in the spaces of the vessel. There is no evidence that the bilge alarm was ever repaired before the last voyage of the F/V TONQUIN.

(F/F 10, Pet. App. 9-10) Crewman John Sprague saw Parker rip out the alarm. (RT 95-96) Sprague never again heard the bilge alarm sound. (RT 96) Two crewmen who survived the sinking testified that they never heard the bilge alarm sound on the TONQUIN, and it did not sound the night of the sinking. (Rohl, pp. 17, 34-35, 39; Swenson, pp. 11, 25) Crewman Burke, who left the boat shortly before the sinking, testified that the bilge alarm did not work and he never heard it sound. (Burke, p. 44)

Petitioner did not challenge the district court's findings concerning the bilge alarm on appeal. (Pet. App. 3)

**c. The Survival Suits On The TONQUIN Had No Lights.**

The district court found that, "None of the survival suits on board was equipped with a light." (F/F 15, Pet. App. 10) Mrs. Tousignant's counsel read into the record the vessel owner's response to Request for Admission No. 2.

> At the time of the sinking of the F/V TONQUIN there were no lights on the survival or emergency suits aboard. Admit or Deny. Admitted. Burt Parker's interview with the surviving crew

> members following the sinking of the F/V TONQUIN reveals that none of the survival suits were equipped with light.

(RT 162) The testimony of the crewmen is consistent with the owner's admission. (RT 93; Rohl, pp. 13-14; Swenson, p. 21; Burke, pp. 55-56)

Petitioner did not challenge this finding on appeal. (Pet. App. 3)

### 3. Larry Tousignant Became Skipper Of The TONQUIN Four Months Before It Sank.

Burt Parker, president of the corporate vessel owner, first hired Larry Tousignant in the early 1970's because Tousignant was an excellent "web man" or net maker. (RT 46; Burke, pp. 8-9) Prior to taking over the TONQUIN, Larry Tousignant had been a deckhand. (RT 47) Parker described Tousignant as a very good deckhand, "one of the best I've had." Tousignant's only prior experience as skipper was to steer the boat while the captain slept (RT 47-48), and to act as skipper of the TONQUIN in 1989 during the oil clean up under charter to the Exxon Corporation. (RT 47)

Tousignant became skipper of the TONQUIN around June 1, 1991. He took three weeks off and returned to Seattle, then assumed his duties as skipper. (RT 316) Tousignant skippered the TONQUIN for the halibut season in August 1991, then took it out in October for its final fateful voyage. (RT 317)

**4. Larry Tousignant Could Probably Have Been Saved If The Bilge Alarm Had Worked Properly And The Survival Suits Had Been Equipped With Lights.**

The TONQUIN sank at 2:40 a.m. in total darkness on October 13, 1991. (F/F 5, Pet. App. 9; RT 137) Swells were 12 to 15 feet with winds of 20 to 25 knots, gusts as high as 45 to 50. *Id.* Vessel owner president Burt Parker admitted that this weather is not unusual for the Gulf of Alaska at that time of year, and testified that the boat should have been able to withstand these conditions. (RT 42) Tousignant could have continued fishing, but two of the crewmen were inexperienced, and all were tired. (Swenson, p. 17) Tousignant decided to wait until calmer weather in the morning so that they could get in one last day of fishing. (Swenson, pp. 16-17)

Crewman Swenson took the wheel from 10:00 p.m. to midnight. (Swenson, p. 47) Tousignant told the engineer to run the bilge pump periodically and then retired to his bunk. (Swenson, p. 48) The TONQUIN seemed to be doing fine and Swenson noted nothing wrong when he checked the aft deck three or four times during his watch. (Swenson, pp. 18, 47) Swenson checked the engine room at the end of his watch and saw no noticeable accumulation of water. (Swenson, p. 50) Crewman Rohl took the helm at midnight and Swenson went to bed. (Swenson, p. 50) An hour into his watch, the vessel began to list, and when the inclinometer reached 10°, Rohl awakened the engineer and sent him to check the engine room. (Rohl, pp. 12, 32) Within three or four minutes, the TONQUIN

was listing 25°. (Rohl, p. 32) At that point, things happened quickly:

> I woke the engineer up and I told him to go down and check the bilges to see if we had a lot of water. He came back up and said there's a whole bunch of water, or something to that effect, and I awakened Larry. At that point, Larry took the wheel, I went down below and looked, and the entire stern was awash.

(Rohl, p. 12)

All crewmen got into survival suits. (Rohl, p. 13; Swenson, p. 20) They radioed their coordinates to the Coast Guard, and after the second Mayday, the engine and generator died. (Swenson, p. 21) The entire crew made it out on the deck and launched the life raft, which deployed upside down. (Swenson, p. 22) Tousignant told the crew to tie themselves off to the painter line on the life raft, but none of the crew did so, and no one saw whether Tousignant tied himself off. (Rohl, p. 36; Swenson, p. 23) The TONQUIN slid out from under the crew, and no one ever saw Larry Tousignant again. (Rohl, p. 14; Swenson, pp. 23-24) The other four crewmen were rescued.

Professional Engineer Windsor testified that a combination of unseaworthy factors caused the TONQUIN to sink on the night of October 13, 1991:

> I think the ship began to take water in the lazarette and because of the leverage drew the stern down. This is a fine-ended vessel which means that when you get down too much by either the stern or the bow there will be a point of – it's chaos, so to speak, where it can either

> stay level, it can roll to port or it can roll to starboard. If it rolls to either port or starboard, it will do so suddenly and it will do so severely, it will be between 15 and 25 degrees, just like a canoe does when you push down on the end of it. Once the aft hatch got submerged because of the combination of down by the stern and roll, then water probably went into the fish hold augmenting the water already flooding the lazarette, the vessel simply didn't have enough buoyancy to withstand that, she went on down.

(Windsor, pp. 38-39)

Search and rescue consultant, Craig Lynch, who had 22 years search and rescue experience in the Coast Guard, testified that remarkably good equipment was available for the search for the survivors of the TONQUIN sinking. (RT 139) Within an hour and a half there were three search and rescue vessels on site. (RT 139) Lynch testified that the probability of rescuing Larry Tousignant would have been 500% higher if his survival suit had been equipped with a proper light as required by Coast Guard regulation. (RT 148)

Crewman Rohl testified firsthand to the importance to a light on a survival suit:

> Probably an hour or two [after the sinking] . . . a Coast Guard helicopter hovered in the vicinity of me approximately – well, close enough that I could have thrown a rock and hit it. He couldn't see me. . . . I was slapping the water, yelling and screaming – of course, you couldn't hear me over the rotor noise. But like I said, he was close enough that I could have thrown a rock and hit him. Had I had a light I probably would have

> been rescued at that point. Had I had a flare I probably would have been rescued at that point.

(Rohl p. 15) Rohl was later rescued by a fishing vessel.

Lynch testified that a bilge alarm would also have increased the likelihood of rescuing Mr. Tousignant:

> The other three people on the boat were rescued – correction, four people on the boat were rescued, and had this crew all had more warning, even though there was confusion, I think the more warning would have given less confusion, better egress, better chance to stay together, chance to have gotten into this life raft right side up and use the life raft with the signaling device that was in it or should have been in it, keep together as a group.
>
> Mr. Tousignant was the most qualified, I guess, at sea of the bunch, or one of the more. We had two green crewmen that survived just fine. So my feeling is, yes, more warning would have made a more effective rescue.

(RT 149)

Crewman Rohl testified that a bilge alarm would have alerted them earlier to the presence of water in the engine room or fish hole, and they could have immediately turned everyone out for bailing out the water. (Rohl pp. 35, 39) Rohl concluded, "If we had an alarm system on that boat it probably would have never sank." (Rohl p. 39)

Based on this evidence, the district court found that "the proximate cause of the loss of Mr. Tousignant's life was the absence of a bilge alarm in good working order

and the lack of survival suits with lights" (Resp. App. 2-3) and entered the following finding of fact:

> The Court finds the testimony of Craig Lynch, the search and rescue expert, credible and reliable. There would have been much greater probability of detection of the skipper and crew had they received early warning from the bilge alarm that the vessel was taking on water and was sinking, or had they been wearing survival suits equipped with lights. There would have been much greater likelihood of saving the vessel from sinking had there been an earlier warning from the bilge alarm that the vessel was taking on water.

(F/F 16, Pet. App. 10-11)

The petitioner did not challenge this finding on appeal. (Pet. App. 3)

**5. Managing Agents Burt Parker And Steve Parker Knew That The TONQUIN Was Unseaworthy And Were Negligent In Failing To Provide a Bilge Alarm, Lights For The Survival Suits, And Funds For Proper Maintenance And Repair.**

Corporate secretary Steve Parker was captain of the TONQUIN before Larry Tousignant assumed command. (RT 32) Burt Parker testified that in his opinion, Steve Parker "knew the vessel TONQUIN better than anyone else." (RT 28) Steve Parker obviously knew that the TONQUIN had no functioning bilge alarm, since he himself ripped the wires out. (F/F 11, Pet. App. 10) After the sinking, Parker's accountant, Dyann Provenzano, asked

the corporate attorney to remove Steve Parker as corporate officer and back date the removal to February 1990, prior to the sinking. (RT 30) In early 1991, crewman John Sprague told Steve Parker and the rest of the crew that he was not going to continue fishing on the TONQUIN because it scared him. (RT 99)

Burt Parker testified that he was aboard the TONQUIN many times during the summer of 1991 (RT 332), and that he is knowledgeable about wooden hulled vessels and knows how to inspect them. (RT 23-24) Two crewmen who testified for the vessel owner both admitted that Burt Parker is concerned about the condition of his vessels, pays attention to the vessels whenever they are in town, and checks their condition. (RT 67, 300) Burt Parker admitted that he knows what a bilge alarm looks like and how to look for it. (RT 25) He admitted that he could tell by looking at a hatch if it was in bad condition, whether there were lights on a survival suit, whether a bilge alarm is operable, and whether a stanchion was loose. (RT 332)

Burt Parker listed the TONQUIN for sale two and a half months before it sank. (RT 65) Parker admitted that he had serious discussions with a potential purchaser named Rod Carew. (RT 65-66) Carew testified that he had a limited amount of money, and that he told Burt Parker and Larry Tousignant that Parker would have to correct any deficiencies in the boat before Carew would buy it. (Carew, pp. 6-7) Tousignant told Carew that the alarms on the boat did not work, including the bilge alarm. (Carew, p. 8) He also told him "about the life raft and the survival suits . . . I needed at least seven or eight survival suits on board." *Id.* Carew discussed these problems with Burt

Parker, who acknowledged that he was aware of the problems including the bilge alarms. (Carew, p. 9)

Burt Parker's accountant testified in her deposition that she had spoken with Mr. Carew about problems with the TONQUIN and had passed that information on to Burt Parker before the TONQUIN sank. (RT 254) After talking with counsel for the vessel owner, the accountant changed her testimony at trial and claimed that she had only spoken with Mr. Carew after the TONQUIN sank. (RT 254-55) Burt Parker also claimed that Carew only told him about the problems with the TONQUIN after the sinking (RT 327-28) The district court chose to believe Mr. Carew.

The district court found that the managing agents of the corporate vessel owner were Burt Parker and his brother Eban Stephen Parker. (F/F 3, Pet. App. 8-9) The district court further found that the managing agents of the corporate vessel owner knew or should have known that the vessel was unseaworthy:

> 9. At the time of its sinking, the TONQUIN had many leaks in the stern of the vessel such that it lacked watertight and structural integrity and was unseaworthy. Actual knowledge of the structural defects in the vessel could have been obtained through a reasonable inspection of the vessel. Burton Parker, the corporate president, was onboard the TONQUIN during the days immediately prior to its last voyage during October of 1991. He knew or should have known of the structural defects in the TONQUIN. His knowledge is chargeable to the corporate vessel owner, Tonquin Fisheries, Inc.
>
> . . .

> 13. Tonquin Fisheries, Inc., through its corporate managing agents, had actual knowledge of the absence of a functioning bilge alarm.

(Pet. App. 9-10)

Petitioner did not challenge these findings on appeal. (Pet. App. 3)

**B. Procedural History**

Faced with an action for the wrongful death of Larry Tousignant, the petitioner filed an action in the Western District of Washington to limit its liability to the value of the vessel. (Pet. App. 39) U.S. District Court Judge Walter McGovern denied the petition to limit liability, holding that the TONQUIN was unseaworthy and that the vessel owner's negligence and knowledge of the structural defects, lack of a bilge alarm and lack of lights on the survival suits established its privity with these unseaworthy conditions. (Pet. App. 9-14) The district court lifted the stay enjoining prosecution of actions arising from the sinking of the TONQUIN, allowing Ymanda Tousignant, as Personal Representative of the Estate of Lawrence Tousignant, to proceed with her wrongful death action. (CL 15, 16, Pet. App. 14; Pet. App. 36-37)

The district court held that the TONQUIN was unseaworthy, in part, because the petitioner violated Coast Guard regulations. (CL 1, Pet. App. 11) These violations contributed to the death of Larry Tousignant. (CL 8, 11, Pet. App. 13-14) Therefore, the district court held that the vessel owner was liable for all damages caused by the death of Larry Tousignant. (CL 14, Pet. App. 14)

The petitioner moved for reconsideration of the district court's findings, claiming that it should be entitled to assert the defenses of comparative negligence and primary duty in the Estate's Jones Act action for damages. The district court reiterated its finding that the vessel owner's violation of safety statutes contributed to the sinking of the vessel and Larry Tousignant's death:

> Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning the bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant.

(Pet. App. 35) The district court denied the petitioner's motion and held that Section 53 of FELA, 45 U.S.C. § 53, barred the defenses of comparative negligence and primary duty. (Pet. App. 34-35)

Petitioner appealed the district court's judgment to the Ninth Circuit Court of Appeals. Petitioner challenged the district court's legal conclusion that it could not assert the doctrines of comparative negligence or primary duty in the Estate's Jones Act case. (Pet. App. 3-4)

The Court of Appeals rejected Tonquin's argument and affirmed the district court in an unpublished memorandum opinion. (Pet. App. 1-7) The Court of Appeals noted that Tonquin did not challenge the district court's findings that Tonquin and its managing agents violated statutory duties of safety, which proximately caused Larry Tousignant's death. (Pet. App. 3, 5-6) The Court of Appeals held that these findings and conclusions "were

necessary components of the district court's litigation analysis" because the district court had to determine what acts of negligence or unseaworthiness caused the accident to occur. (Pet. App. 5-6) The Court of Appeals held that the district court's findings and conclusions precluded petitioner from raising issues of Larry Tousignant's comparative negligence under Section 53 of FELA and "that Tonquin would be liable to the estate for all damages arising out of Captain Tousignant's death." (Pet. App. 6)

## ARGUMENT FOR DENYING THE PETITION

The petitioner asks this Court to review an unpublished memorandum decision, affirming a district court's factual findings which were unchallenged on appeal, and construing the plain language of an unambiguous statute consistent with the opinion of another circuit of the Court of Appeals. Petitioner has offered no argument that the decision of the Court of Appeals meets any of this Court's criteria under Sup. Ct. R. 10. This Court should deny the petition because the decision below was a correct interpretation of federal law.

### A. The Plain Language Of Section 53 Precludes The Imposition Of Comparative Negligence Where, As Here, The Employee's Injuries Are Caused, In Whole Or Part, By The Employer's Violation Of A Statutory Duty Of Safety.

The Court of Appeals decision construes a plain and unambiguous statute. Congress rejected the reduction of

a seaman's damages for comparative negligence where the seaman's injury was caused, in whole or in part, by the employer's violation of a safety statute under Section 53 of the Federal Employer Liability Act ("FELA") 45 U.S.C. § 53. Rather than constituting a far reaching "departure from the accepted and usual course of judicial proceedings," Sup. Ct. R. 10, the Court of Appeals adopted the only logical interpretation of Section 53 based upon its clear language.

Section 53 of FELA unambiguously precludes any reduction of an employee's injuries for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury:

> . . . [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

45 U.S.C. § 53.

The Jones Act expressly grants to seamen all the rights and remedies available to railroad workers under FELA:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law . . . and in such action all statutes of the United

> States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . .

46 U.S.C. § 688. Section 53 of FELA, including its prohibition against comparative negligence upon a finding of an employer's violation of a safety statute, is part and parcel of the rights and remedies granted to respondent under the Jones Act.

Petitioner's dissertation on the role of comparative fault in admiralty jurisprudence is wholly irrelevant to the issue at hand because Congress has enacted an unambiguous rule of law, which precludes the imposition of comparative negligence where a violation of safety statutes has contributed to a seaman's death in a Jones Act case. This Court has noted that it may not ignore the plain language of a statute merely because Congress enacted a rule with which the Court may disagree:

> When Congress does speak directly to a question, the courts are not free to supplement Congress's answer so thoroughly that the Act becomes meaningless.

*Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 325, 112 L. Ed. 2d 275 (1990) (quotation omitted). Moreover, the cases relied upon by petitioner in its discussion of the doctrine of comparative negligence involve the application of the doctrine to claims for property damages under admiralty law, personal injuries under general maritime law or under the Jones Act in the absence of a

safety statute violation.[2] They provide no guidance on the construction of Section 53.

Confronted with the plain language of Section 53, petitioner contends that the statute bars only the imposition of "contributory negligence and not comparative fault," (Petition at 10) and mandates the application of comparative fault in all cases, even where the employer has violated a safety statute. Petitioner's semantic argument creates a distinction without a difference. Congress enacted a system of "proportionate" or "comparative" fault, but called it "contributory negligence," employing the term in use at the turn of the century. Petitioner's interpretation effectively reads the proviso of Section 53 out of the statute, making the proviso a nullity. By contrast, the Court of Appeals' decision gives effect to the entire statute, including the proviso. *See* ***Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana***, 472 U.S. 237, 249, 105 S. Ct. 2587, 2594, 86 L. Ed. 2d 168 (1985).

This Court should deny the petition because Congress meant to bar the imposition of any type of contributory negligence under FELA, including comparative

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[2] *See* ***United States v. Reliable Transfer Co.***, 421 U.S. 397, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975) (Court applied Jones Act comparative negligence principles to property damage case in admiralty); ***Dickens v. United States***, 815 F. Supp. 913 (E.D. Va. 1993) (seaman's action for unseaworthiness); ***Petition of New England Fish Co.***, 465 F. Supp. 1003 (W.D. Wash. 1979) (same); ***Williams v. Hollywood Marine***, 717 F. Supp. 437 (E.D. La. 1989) (general maritime law); ***Superior Oil Co. v. Trahan***, 322 F.2d 234 (5th Cir. 1963) (Jones Act – no safety statute violation); ***Walsh v. Boston Sand & Gravel Co.***, 175 F. Supp. 411, 413 (D. Mass. 1959) (same).

negligence, where an employee's injuries have been caused by the employer's safety statute violation.

### B. The Court Of Appeals Decision Follows This Court's Precedent Interpreting The Jones Act And Is In Accord With The Only Other Court Of Appeals Decision Addressing FELA Section 53's Prohibition Of Comparative Negligence Under The Jones Act.

The Court of Appeals decision comports with this Court's Jones Act precedent and is in accord with the only other Court of Appeals decision that addresses the application of comparative negligence in a Jones Act case upon an employer's violation of a safety statute. This Court should deny the petition because this unpublished memorandum decision meets none of the Court's criteria for review.

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S. Ct. 394, 2 L. Ed. 2d 382 (1958), this Court relied upon the language of Sections 53 and 54 in holding that the violation of a Coast Guard regulation established negligence per se under the Jones Act. Although not squarely addressing the application of comparative negligence upon a vessel owner's safety statute violation, the *Kernan* Court quoted Section 54, which uses the term "any statute enacted for the safety of employees," in holding that the violation of **any** statutory safety duty established negligence per se. 355 U.S. at 438 n.8. The Court of Appeals decision is in accord with *Kernan*.

The Court of Appeals decision also follows the only other Circuit which has addressed the application of Section 53's proviso in a Jones Act case. In ***Roy Crook and Sons v. Allen***, 778 F.2d 1037 (5th Cir. 1985), the Fifth Circuit held that Section 53 of FELA barred a vessel owner's reliance on comparative negligence because the vessel was undermanned, in violation of the manning statute, 46 U.S.C. § 222, which authorizes the Coast Guard to determine the size of the crew required on vessels. As in this case, the Jones Act claim in ***Roy Crook*** was brought by the widow of the vessel's captain. The Fifth Circuit held that the manning statute was "enacted for the safety of employees" within the meaning of Section 53, and that its violation contributed to the captain's death. The Court reversed a reduction of the judgment for comparative negligence.

As the decision below conflicts with no other Court of Appeals decisions, petitioners rely instead on district court cases interpreting Section 53 of FELA which are neither authoritative nor persuasive. In ***Heath v. Matson Navigation Co.***, 333 F. Supp. 131 (D. Ha. 1971), a firehose was used to pump molasses, in violation of a Coast Guard regulation restricting the use of firehoses for any purpose other than fire extinguishing, drills and testing. A seaman sued under the Jones Act after he tripped over the hose and was injured. The district court rejected the seaman's motion to strike the defense of contributory negligence under Section 53 for two reasons. First, the court held that the breach of the duty arose from "the violation of a non-safety statute or regulation." 333 F.

Supp. at 133. Additionally, the violation of the regulation did not contribute to the injury:

> It is the fact that the hose was left out on deck, rather than any use in violation of a regulation which brought about Heath's injury. The hose could just as readily have been left out on deck after a drill, cleaning or replacement.

333 F. Supp. at 135. In the instant case, by contrast, the district court expressly found that the violation of duties required by statutes enacted for the safety of employees, 46 U.S.C. § 4502 and § 4102 (*see infra* at 23-24), contributed to Larry Tousignant's death. (F/F 16, CL 8, 11, Pet. App. 10-14; Pet. App. 34-35)

***Bertholf v. Burlington Northern Railroad***, 402 F. Supp. 171 (E.D. Wash. 1975) (discussed in Petition at 16) was not a Jones Act case, but a FELA case involving a railroad worker who claimed that his injury arose from his employer's failure to inspect a crane and hoist in accordance with Occupational Safety and Health Act (OSHA) regulations. The district court held that a violation of OSHA regulations could not eliminate comparative negligence under FELA because OSHA, 29 U.S.C. § 653, expressly makes OSHA regulations inapplicable to FELA cases.[3] In the instant case, by contrast, the employer did not violate a generalized OSHA requirement which Congress made expressly inapplicable to an

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[3] 29 U.S.C. § 653(b)(4) provides that OSHA shall not "be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers. . . ."

employee's action against the employer. Instead, petitioner violated a specific statutory duty of safety limited to the fishing industry, one which lacks OSHA's proviso barring the statute's application to a worker's claim against an employer.

This Court should deny the petition because the Court of Appeals decision construing Section 53 of FELA does not conflict with any other Court of Appeals decision.

### C. Larry Tousignant Was A Seaman/Employee Within The Meaning Of FELA And The Jones Act.

Larry Tousignant was a seaman within the meaning of the Jones Act and an employee under FELA. Petitioner again ignores the plain language of the statute and established precedent in arguing that a vessel's captain cannot be a "seaman" under the Jones Act or an "employee" within the meaning of FELA. *See* ***Southwest Marine, Inc. v. Gizoni***, 502 U.S. 81, 86-87, 112 S. Ct. 486, 491, 116 L. Ed. 2d 405 (1991) (exclusion under LHWCA of "master or member of a crew of any vessel" is refinement of term "seaman" under Jones Act).

Petitioner's argument is essentially that a captain cannot sue his employer even when the employer's negligence proximately causes his injury. It is simply a variety of the "primary duty" doctrine, which holds that a seaman cannot recover where only the seaman was negligent. But no circuit applies this rule, where, as here, the seaman was not solely responsible for his own injuries. Thus, a captain's claim is not barred where the owner or other employees were responsible for his injuries. *See*

*Roy Crook & Sons, Inc. v. Allen*, 778 F.2d 1037, 1043 (5th Cir. 1985) (Jones Act claim by captain's estate); *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 6553, 655 (2nd Cir. 1980) ("The issue, therefore, is whether the captain's error of judgment, negligence though it might be, was the sole cause of his death."); *Boat Dagny, Inc. v. Todd*, 224 F.2d 208, 210 (1st Cir. 1955) (Primary duty doctrine did not bar a Jones Act claim by the master of the vessel because the jury could have found on the evidence that the ship's engineer negligently failed to restore power more quickly.).

The Court of Appeals correctly rejected the petitioner's primary duty argument because petitioner, and not Larry Tousignant, had the primary duty of furnishing the vessel with a functioning bilge alarm and survival suits. Larry Tousignant was a seaman under the Jones Act and an employee within the meaning of FELA. This Court should deny the petition for certiorari.

**D. Petitioner Breached A Statutory Duty Enacted For The Safety Of Employees When It Violated Coast Guard Regulations Enacted Under The Commercial Fishing Industry Vessel Safety Act Of 1988, 46 U.S.C. § 4502 and 46 U.S.C. § 4102. These Violations Contributed To The Death Of Larry Tousignant.**

Petitioner breached a statutory duty enacted for the safety of employees. The Coast Guard regulation requiring a bilge alarm was promulgated pursuant to 46 U.S.C. § 4502 "which requires safety equipment and operational stability for certain vessels in the commercial fishing industry. . . . " 46 C.F.R. § 28.10. 46 U.S.C. § 4502 was part of the Commercial Fishing Industry Vessel Safety Act of

1988. The House Report recites that one of the purposes of the Act was "to establish new and more comprehensive safety requirements for commercial fishing industry vessels." 1988 ***U.S. Code Cong. and Admin. News*** p. 2149. The Report pointed out that, "Overall, commercial fishing is one of the most dangerous occupations in the United States . . . " and concluded:

> The dilemma for fishermen is made more severe by the fact that safety problems . . . are in turn exacerbated when economic pressures force boat operators to fish in harsher weather or further from shore than normal, *or to postpone or neglect needed safety improvements.*

*Id.* at 2150, 2151-52 (emphasis supplied). The Act prohibits the operation of any vessel in violation of regulations prescribed under the Act, 46 U.S.C. § 4504, and makes the owner, managing operator, agent, master, and individual in charge of the vessel all liable for a violation. 46 U.S.C. § 4507.

Lights are required on survival suits under 46 C.F.R. § 25.25-13, which was promulgated in 1988 pursuant to 46 U.S.C. § 4102, entitled "Safety Equipment", authorizing the Secretary of Transportation to regulate the type of lifesaving devices on uninspected vessels such as the TONQUIN. 44 Fed. Reg. 4479 (2/7/84).[4] The stated purpose of the requirement was "to prevent some of the loss of life that can occur when persons are forced to enter the water after abandoning ship." *Id.*

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[4] The regulation took effect August 6, 1984, seven years before Tousignant became skipper of the TONQUIN.

Congress enacted these statutes "for the safety of employees" within the meaning of FELA § 53. Congress even noted that the statutory scheme was all the more necessary because financial pressures might cause vessel owners "to postpone or neglect needed safety improvements", just as the district court found occurred in this case due to the owner's "extreme financial distress." (F/F 18, Pet. App. 11)

The district court found that these safety violations "contributed to the injury or death of such employee" within the meaning of FELA § 53. (Resp. App. 2-3; F/F 16, CL 8, 11, Pet. App. 10-11, 13, 14) It reiterated this determination in denying petitioner's post-trial motion:

> Tonquin may not assert the contributory negligence of Lawrence Tousignant in defense of the damage claim because the Court has found that violation of safety statutes, specifically Coast Guard regulations concerning the bilge alarms and lights on survival suits contributed to the sinking of the vessel and/or the death of Lawrence Tousignant. *See* 46 U.S.C. Appx. § 688 and 45 U.S.C. § 53.

(Pet. App. 35) The Court of Appeals correctly affirmed this decision.

### E. The Court Of Appeals Decision Is In Accord With This Court's Precedent Holding That Congress Intended FELA And The Jones Act To Provide A Flexible And Evolving Remedy To Injured Employees.

Petitioner presents a misleadingly narrow view of the caselaw construing Section 53 of FELA and the Jones Act,

ignoring the liberal interpretation this Court has given to these remedial statutes. For instance, petitioner ignores eighty years of Supreme Court precedent holding that Congress meant what it said in enacting Section 53 of FELA. *See*, ***Rogers v. Missouri Pacific Railroad Co.***, 352 U.S. 500, 507 n.13, 77 S. Ct. 443, 1 L. Ed. 2d 493 (1957) ("Proof of violation of certain safety appliance statutes without more provides negligence and also eliminates contributory negligence as a consideration for any purpose."); ***Coray v. Southern Pacific Co.***, 335 U.S. 520, 524, 69 S. Ct. 275, 93 L. Ed. 208 (1949) ("And to make its purpose crystal clear, Congress has also provided that 'no such employee shall be held to have been guilty of contributory negligence in any case' where a violation of the Safety Appliance Act, such as the one here, 'contributed to the death of such employee.' "); ***Seaboard Airline v. Horton***, 233 U.S. 492, 503, 34 S. Ct. 635, 58 L. Ed. 1062 (1914) (Congress declared in Sections 53 and 54 of FELA that neither contributory negligence nor assumption of risk "shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employee").

Congress gave seamen-employees the benefit of "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees. . . . " 46 U.S.C. § 688. This Court has consistently held that this section gives injured seamen the same rights and remedies given to injured railway workers under FELA. *See* ***Kernan v. American Dredging Co.***, 355 U.S. 426, 439, 78 S. Ct. 391, 401, 2 L. Ed. 2d 382 (1958) (Jones Act "expressly provides for seamen

the cause of action – and consequently the entire judicially developed doctrine of liability – granted to railroad workers by the FELA"). In the rare case where the literal application of FELA would frustrate Congress's purpose of providing seamen liberal rights of recovery, the Court has expanded, not narrowed, Jones Act remedies:

> The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

*Cox v. Roth*, 348 U.S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955).

Petitioner's policy argument, that excusing employers' violation of statutory duties designed to protect employees would advance safety, turns logic on its head. Comparative negligence remains the general rule under Section 53 of FELA. Thus, where Congress has not imposed a statutory duty of safety upon an employer, the employer and employee share responsibility for an employee's damages in proportion to their respective fault. But Congress has chosen to secure employers' compliance with statutory standards of safety by prohibiting a reduction of an employee's judgment for comparative negligence where the employer's violation of a safety statute contributes to the employee's injury. Contrary to

petitioner's argument, the prohibition against comparative negligence upon a finding of an employer's safety statute violation promotes safety on board fishing vessels by placing responsibility on the party with the resources and primary control over the conditions of the vessel. Surely, the fishing vessel owner, who maintains a vessel season after season, is in a better position to secure a safe vessel and equipment than is the employee, whose presence on the vessel may be no more than transitory. In any event, this is a policy judgment which Congress has already made, and not one for the Court.

In addition to following the plain language of the statute, the Court of Appeals decision is consistent with this Court's liberal interpretation of the expansive remedies under FELA and the Jones Act. The Court of Appeals decision advances the public policy of enforcing compliance with safety statutes enacted for the safety of workers. This Court should deny the petition.

## CONCLUSION

This is a petition for certiorari from an unpublished opinion, interpreting an unambiguous statute in accordance with the decisions of this Court and another circuit Court of Appeals, and involving a review of district court findings which were unchallenged on appeal. For the foregoing reasons, this Court should deny the petition for certiorari.

RESPECTFULLY SUBMITTED this 13th day of December, 1995.

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[p. 2] Seattle, Washington August 30, 1993

THE COURT: The first matter that we must dispose of is the claim of Evelyn Ward. On February 3, 1992, Mr. Ramsey mailed to Mrs. Ward a copy of the notice of complaint for exoneration from or a limitation of liability in this particular action. That notice expressly advises that each claimant, including Mrs. Ward, must not only file his or her claim with the court but must also serve a copy of that claim on plaintiff's attorneys. The public notice, as published in the Daily Journal of Commerce on four consecutive weeks during the month of February 1992, also expressly so advised; that is, that a copy of the claim must be served upon the attorneys for the plaintiff. Mrs. Ward did not serve a copy on plaintiff's counsel as required to do so on or before March 16, 1992, a date long passed. Claimant's motion to dismiss the claim of Evelyn Ward is, therefore, granted. Claimant's motion to dissolve the stay entered herein on January 31, 1992, upon the Tonquin Fisheries complaint for exoneration from or limitation of liability is also granted.

In brief, under the evidence before the Court and reasonable inferences to be drawn from that evidence, I find that the cause of the sinking apparently was the entry of water through the stern of the vessel and the lack of water integrity of the vessel's hull at that point.

(2) Coast Guard regulations that became effective [p. 3] September 15, 1991, a month before the vessel sank on October 13, 1991, among other things, required bilge alarms in such areas as the lazaret, machinery space and other space subject to flooding from seawater piping

within the space. This breach of a statutory duty establishes fault on the part of the owner.

(3) John Sprague testified that to the end of May 1991, there was no operating bilge alarm because Steve Parker, Tonquin's secretary, and the then skipper of the Tonquin and crew member Stineman yanked out the wires of the bilge alarm in frustration over its going off inappropriately and unrelated to the water level and spaces of the vessel. There is no evidence that the bilge alarm was ever repaired just before the voyage. The vessel corporation knowing of this had actual knowledge of the absence of a bilge alarm.

As a matter of law, there can be no other conclusion that a reasonable person could draw, to wit: the Tonquin was unseaworthy at the time of its last voyage.

And the question of causation: Craig Lynch, the search and rescue expert, testified that there would have been much greater probability of detection of the skipper and crew had they received early warning from a bilge alarm that the vessel was taking on water and had the skipper and crew been wearing survival suits equipped with lights.

(5) The proximate cause of the loss of Mr. Tousignant's life was the absence of a bilge alarm in good working order and [p. 4] the lack of survival suits with lights.

The claimant may proceed to have her claim for damages tried before a jury in this Court. Claimant shall prepare the necessary and appropriate findings and conclusions and order consonant with and including but not

necessarily limited to what I have stated here today. Serve a copy on counsel for plaintiff, and note the same for entry by the Court. Thank you for your help, fellas. We are in recess.

I, Robert R. Molezzo, Official Court Reporter, do hereby certify that I was present in court and in attendance upon the hearing of the foregoing matter; that I reported said proceedings and thereafter caused the same to be transcribed under my direction; I do further certify that the foregoing transcript is a true and accurate transcription of said proceedings.

September 28, 1993

/s/ Robert R. Molezzo

**46 U.S.C. § 4102. Safety equipment**

(a) Each uninspected vessel propelled by machinery shall be provided with the number, type, and size of fire extinguishers, capable of promptly and effectively extinguishing burning liquid fuel, that may be prescribed by regulation. The fire extinguishers shall be kept in condition for immediate and effective use and so placed as to be readily accessible.

(b) Each uninspected vessel propelled by machinery shall carry at least one readily accessible life preserver or other lifesaving device, of the type prescribed by regulation, for each individual on board.

(c) Each uninspected vessel shall have the carburetors of each engine of the vessel (except an outboard motor) using gasoline as fuel, equipped with an efficient flame arrestor, backfire trap, or other similar devices described by regulation.

(d) Each uninspected vessel using a volatile liquid as fuel shall be provided with the means prescribed by regulation for properly and efficiently ventilating the bilges of the engine and fuel tank compartments, so as to remove any explosive or flammable gases.

(e) Each manned uninspected vessel operating on the high seas or beyond three nautical miles from the coastline of the Great Lakes shall be equipped with the number and type of alerting and locating equipment, including emergency position indicating radio beacons prescribed by the Secretary.

**46 U.S.C. § 4502. Safety standards**

(a) The Secretary shall prescribe regulations which require that each vessel to which this chapter applies shall be equipped with –

(1) readily accessible fire extinguishers capable of promptly and effectively extinguishing a flammable or combustible liquid fuel fire;

(2) at least one readily accessible life preserver or other lifesaving device for each individual on board;

(3) an efficient flame arrestor, backfire trap, or other similar device on the carburetors of each inboard engine which uses gasoline as fuel;

(4) the means to properly and efficiently ventilate enclosed spaces, including engine and fuel tank compartments, so as to remove explosive or flammable gases;

(5) visual distress signals;

(6) a buoyant apparatus, if the vessel is of a type required by regulations prescribed by the Secretary to be equipped with that apparatus;

(7) alerting and locating equipment, including emergency position indicating radio beacons, on vessels that operate on the high seas; and

(8) a placard as required by regulations prescribed under section 10603(b) of this title.

(b)(1) In addition to the requirements of subsection (a) of this section, the Secretary shall prescribe regulations requiring the installation, maintenance, and use of

the equipment in paragraph (2) of this subsection for documented vessels to which this chapter applies that –

(A) operate beyond the Boundary Line;

(B) operate with more than 16 individuals on board; or

(C) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The equipment to be required is as follows:

(A) alerting and locating equipment, including emergency position indicating radio beacons;

(B) lifeboats or liferafts sufficient to accommodate all individuals on board;

(C) at least one readily accessible immersion suit for each individual on board that vessel when operating on the waters described in section 3102 of this title;

(D) radio communications equipment sufficient to effectively communicate with land-based search and rescue facilities;

(E) navigation equipment, including compasses, radar reflectors, nautical charts, and anchors;

(F) first aid equipment, including medicine chests; and

(G) other equipment required to minimize the risk of injury to the crew during vessel operations, if the Secretary determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment.

(c)(1) In addition to the requirements described in subsections (a) and (b) of this section, the Secretary may

prescribe regulations establishing the standards in paragraph (2) of this subsection for vessels to which this chapter applies that –

(A)(i) were built after December 31, 1988, or undergo a major conversion completed after that date; and

(ii) operate with more than 16 individuals on board; or

(B) in the case of a fish tender vessel, engage in the Aleutian trade.

(2) The standards shall be minimum safety standards, including standards relating to –

(A) navigation equipment, including radars and fathometers;

(B) lifesaving equipment, immersion suits, signaling devices, bilge pumps, bilge alarms, life rails, and grab rails;

(C) fire protection and firefighting equipment, including fire alarms and portable and semiportable fire extinguishing equipment;

(D) use and installation of insulation material;

(E) storage methods for flammable or combustible material; and

(F) fuel, ventilation, and electrical systems.

(d)(1) The Secretary shall prescribe regulations for the operating stability of a vessel to which this chapter applies –

(A) that was built after December 31, 1989; or

(B) the physical characteristics of which are substantially altered after December 31, 1989, in a manner that affects the vessel's operating stability.

(2) The secretary may accept, as evidence of compliance with this subsection, a certification of compliance issued by the person providing insurance for the vessel or by another qualified person approved by the Secretary.

(e) In prescribing regulations under this chapter, the Secretary –

(1) shall consider the specialized nature and economics of the operations and the character, design, and construction of the vessel; and

(2) may not require the alteration of a vessel or associated equipment that was constructed or manufactured before the effective date of regulation.

(f) To ensure compliance with the requirements of this chapter, at least once every 2 years the Secretary shall examine –

(1) a fish processing vessel; and

(2) a fish tender vessel engaged in the Aleutian trade.

**46 U.S.C. § 4504. Prohibited acts**

A person may not operate a vessel in violation of this chapter or a regulation prescribed under this chapter.